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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

HPSC, INC. , Plaintiff and Respondent, v. BARBARA TIFFANY, as Executrix, etc., Defendants and Appellants.	D061142 (Super. Ct. No. 37-2010-00095853-CU-CO-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Joel M. Pressman, Judge. Affirmed.

Leon J. Saad & Associates, Leon J. Saad for Defendants and Appellants.

Law Offices of Matthew D. Rifat and Matthew D. Rifat for Plaintiff and Respondent.

Defendant and appellant Barbara Tiffany, individually and as executrix of her late husband and former fellow defendant Dr. Frank J. Tiffany (Appellants), appeals a summary judgment granted in favor of plaintiff and respondent HPSC, Inc. (Respondent), in this damages action for breach of contract and related theories based on a medical

equipment lease. (Code Civ. Proc., § 437c; all further statutory references are to this code unless noted.)[1] After Respondent (the original lessor, HPSC), filed this action, it assigned its interest in the lease to Dr. David James Smith, who pursued the action in its name and obtained this summary judgment against Dr. Tiffany. At the request of Respondent, the action was dismissed as to Mrs. Tiffany, with an order that each of those two parties shall bear its own attorney fees and costs.

On appeal, Appellants argue there were procedural irregularities that should have resulted in the denial of the summary judgment motion. The trial court denied their request for a continuance to allow further discovery on the manner in which the lease interest assignment was made to Dr. Smith by the original lessor, after the lease was breached and while enforcement proceedings were being conducted. Appellants contended that the assignment was improper because at the same time, Dr. Smith was a judgment debtor to defendant Dr. Tiffany in an unrelated case, and arguably, any offset would be unfair. Appellants further contend Respondent's proof was inadequate to support summary judgment, because only a copy of the medical equipment lease was provided in the complaint and in the summary judgment moving papers. They additionally argue the amount of the judgment for damages is incorrect for several reasons, and that Mrs. Tiffany is a prevailing party who should not have been ordered to

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1 After the death of appellant Frank J. Tiffany, this court issued an order that his executrix and fellow appellant Barbara Tiffany be substituted as a party to this action in his place. Except when necessary to distinguish between the two (as Dr. or Mrs.), we refer to both party defendants as Appellants.

bear her own fees and costs, in connection with her dismissal as a defendant at the hearing on the motion. (§ 1032, subd. (b).)

We reject Appellants' challenges to the trial court's granting of the motion for summary judgment and to the related orders. Respondent demonstrated as a matter of law that it was entitled to prevail on its breach of contract and other theories, and through assignment, a proper real party in interest pursued the action on the lease. (§ 367.) The trial court appropriately analyzed the legal issues and did not abuse its discretion in denying the requested continuance or making the costs award. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. Lease, Complaint and Assignment

As alleged in the complaint and its exhibits, Respondent is a Delaware corporation that was licensed to conduct business in California. On September 8, 2000, Dr. Tiffany signed Respondent's seven-year lease for $175,000 worth of medical x-ray and ultrasound equipment, requiring three deferred payments and then 80 payments of $3,042.65 each. Dr. Tiffany signed on both the lessor and lessee lines, and Mrs. Tiffany signed under the lessee portion. The lease contains an attorney fees clause. On September 15, 2000, Dr. Tiffany signed an acknowledgment of receipt of the equipment.

On February 26, 2002, Dr. Tiffany signed Respondent's letter to renegotiate the lease, agreeing to a revised payment schedule of 66 payments of $3,438.24 and five payments of $3,536.l5, commencing March 1, 2002. A UCC-1 financing statement granted Respondent a security interest in the equipment and collateral.

In August 2003, Appellants defaulted on the lease payments, and Respondent notified them the entire unpaid accelerated balance due was $205,327.23, and sought possession of the subject equipment and collateral.

On July 9, 2010, Respondent sued Appellants for damages for breach of lease agreement, claim and delivery, and conversion.

In October 2010, Dr. Smith obtained an assignment of the rights to collect any sums due under the lease and to litigate the existing action. Respondent's representative, Stu Brenner, caused to be filed a substitution of attorney of Respondent's former counsel with new counsel, Matthew Rifat. Rifat filed a first amended complaint on the same theories, disclosing in it that when Respondent filed a previous action in October 2003 on the same lease default, Appellants filed for chapter 13 personal bankruptcy protection in March 2004. Appellants' bankruptcy proceeding remained pending until March 2009 when they stopped making payments to Respondent and others under their chapter 13 plan, and the case was dismissed. Respondent alleged there were currently no applicable bars of the statute of limitations, because all limitations period had been tolled.

Appellants filed their answer in May 2011, and ex parte, sought an order calendaring discovery motions, alleging that Respondent had failed to supply requested discovery. No such order or motions are in the record. Appellants claimed that Rifat was apparently house counsel for Dr. Smith, and Rifat bragged to them that Dr. Smith had acquired Respondent's claim "for a shockingly low amount." Appellants argued that since Dr. Smith had recently been held liable to Dr. Tiffany for a large monetary disability discrimination judgment, Dr. Smith was apparently planning to use the current

claim as an offset, which they argued would be unfair. (*Tiffany v. Smith* (Aug. 31, 2012, D058510) [nonpub. opn.] [affirming disability discrimination judgment for Tiffany].)

Among other things, Appellants argued in ex parte proceedings that they needed discovery from Respondent to support their claims that Appellants should not be held personally liable on the subject leases, because Dr. Tiffany had signed it only as an employee of another doctor, Dr. James Hogan, who was the real intended lessee. After Appellants were sued by Respondent in 2003, Appellants sued Dr. Hogan in Clark County, Nevada for return of the equipment, fraud, contribution and indemnity, and they claimed they never had the benefit of the equipment. Rather, Dr. Tiffany alleged he "lent" the equipment to Dr. Hogan, who refused to return it. Dr. Hogan went bankrupt and then died, and all the earlier cases were dismissed.

Also, Appellants believed that the copy of the lease attached to the complaint may not be authentic, due to "a line under the signatures of varying thickness which [Respondent] admits is an aberration and not ordinarily present on the forms."

C. Current Motion; Ruling

In June 2011, Respondent filed its motion for summary judgment or alternatively, summary adjudication, on all claims. It argued Appellants had made judicial admissions in their own bankruptcy case that Respondent was included in their chapter 13 plan as a creditor, and through their plan, they had made $15,637 payments to it. However, their bankruptcy case was ultimately dismissed for failure to make plan payments as required.

In the process of renegotiating the lease in 2002, Dr. Hogan's office sent several faxes to Dr. Tiffany seeking his signature. Respondent argued that Appellants had made

judicial admissions in their state court action in Nevada against Dr. Hogan, and in his bankruptcy case, that they were entitled to lawful possession of the leased equipment. Appellants admitted $237,728.11 was then due under the subject lease and they were obligated to make payments. They obtained relief from Dr. Hogan's bankruptcy stay to pursue that Nevada suit.

In support of its summary judgment motion, Respondent filed an attorney declaration attaching a copy of the lease and the lease amendment. It also supplied a declaration from its managing agent Brenner, stating that Appellants had breached the lease by nonpayment and the amount due was approximately $208,000.[2]

Also in support of the motion, Respondent requested judicial notice of the pleadings and orders in the bankruptcy matters, the earlier California action against Appellants, and the Nevada action against Dr. Hogan.

Appellants filed opposition, claiming that they had been deprived of essential discovery about the nature of the assignment of Respondent's claim to Dr. Smith, and the trial court should permit them additional time for discovery. On the merits, Appellants mainly claimed that the copy of the lease provided with the complaint in the moving papers was possibly inadequate, because it appeared to be altered (an anomalous line under the signatures of varying thickness). Their declarations stated that the document they signed was a different one, which also contained a signature of Dr. Hogan, and they

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2 The copy of Brenner's declaration in Appellants' appendix on appeal is not signed. Many of the documents in the appendix are nonconformed copies. The trial court's ruling stated that this declaration was signed under penalty of perjury, and we accept the record as presented to us as including such a signed declaration.

did not have the benefit of the use of the equipment. Their attorney in one of the previous cases, Howard Thomas, provided a declaration stating that Appellants had tendered to Respondent the possession of the subject medical equipment, assuming their anticipated recovery of it from Dr. Hogan was successful, but Respondent had refused any such offer of the equipment and said it was worthless.

Appellants further argued the interest rate in the transaction was violative of usury laws, there was a failure to mitigate Respondent's damages by seeking recovery of the leased equipment, and the alternative claim and delivery or conversion claims were groundless.

Appellants raised evidentiary objections to the declarations of Respondent's attorney and its managing agent Brenner, generally contending that they contained speculation, lacked personal knowledge and proper foundation, and contained improper legal conclusions. Appellants sought judicial notice of pleadings and orders filed in the various previous cases.

In reply, Respondent filed evidentiary objections to the declarations of Appellants, as improperly offering unqualified "expert" testimony about the adequacy of the copy of the lease. Respondent asserted they were judicially estopped from denying the lease was valid and enforceable. Regarding the declaration from Appellants' previous attorney Howard Thomas, Respondent objected that he lacked personal knowledge of whether the equipment was recovered or tendered back to Respondent.

At the hearing, Respondent's attorney stated it was deleting its claim for an award of interest under the lease, to comport with the damages figures argued by Appellants.

Respondent orally moved to dismiss Mrs. Tiffany as a defendant, if it would make it easier for everyone or simplify the case. Appellants' attorney said a unilateral dismissal without a fees award would be appropriate. Next, the court agreed to dismiss Mrs. Tiffany, and ordered that each side would bear its own fees and costs as to the claims against her. Appellants' counsel responded, "Thank you."

The court's order and judgment took judicial notice as requested and overrruled evidentiary objections brought by each side (except as noted below), and stated that it had considered only relevant and admissible evidence in reaching its decision in the matter. Despite Appellants' objection, there were no existing impediments to Respondent's conducting of business in California, as it was a licensed corporation. The court noted no earlier motions to compel discovery had been brought by Appellants, denied their request for a continuance, and granted the summary judgment motion as to Dr. Tiffany. Judgment was entered against him in the amount of $176,341.80, plus costs. Appellants timely appealed.

DISCUSSION

Summary judgment rulings are reviewed de novo. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767.) The evidence is viewed in the light most favorable to the opposing party, by resolving any evidentiary doubts or ambiguities in its favor. (*Id.* at p. 768.) Once the moving party has provided evidentiary submissions that show no material issues of fact require the process of a trial, the burden shifts to the opponent to show that a triable issue of one or more material facts exists. (§ 437c, subd. (p)(1); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853 (*Aguilar*).) Summary

judgment is proper if no triable issue of fact is shown by all the papers submitted, such that the moving party is entitled to judgment as a matter of law. (*Orrick Herrington & Sutcliffe v. Superior Court* (2003) 107 Cal.App.4th 1052, 1056-1057.)

On de novo review, the appellate court is not obligated " ' "to cull the record for the benefit of the appellant in order to attempt to uncover the requisite triable issues. As with an appeal from any judgment, it is the appellant's responsibility to affirmatively demonstrate error," ' " through citations to the record and applicable authorities. (*Baines v. Moores* (2009) 172 Cal.App.4th 445, 455.)

The trial court's evidentiary rulings are reviewed under a standard of abuse of discretion. (*Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694.) Appellants' various procedural and evidentiary arguments are discussed as they affect the merits of the summary judgment ruling.

I

ADEQUACY OF RESPONDENT'S SHOWING ON SUMMARY JUDGMENT: PROCEDURAL MATTERS

A. Discovery Requests on Potential Defense to Assignability

Appellants contend that a better defense to the summary judgment motion could have been provided if a continuance had been granted, according to the terms of section 437c, subdivision (h): "If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court

shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just. . . ."

This argument requires us to address the reason and justification for the ongoing continuance request. Appellants wanted to pursue discovery in an attempt to show that the underlying assignment of the lease claims to a private party, Dr. Smith, was somehow improper, because Dr. Smith had developed ulterior motives to collect from Dr. Tiffany, when Dr. Tiffany obtained a money judgment against Dr. Smith. Appellants objected that Dr. Smith had apparently obtained the assignment at a discount, after the filing of the complaint. Appellants essentially argued that they might be able to prove an equitable defense of unclean hands, to destroy the overall validity of the assignment and prevent any recovery on the part of Respondent. A copy of the assignment document was included in their opposition to the summary judgment motion, but they wanted something more, which was not described in detail.

The simple answer to Appellants' claim of error in denying a continuance is, as the trial court noted, that they had failed to file any motions to compel discovery earlier on, when they first raised these claims. Without a further showing of diligence, they could not again request a continuance on that basis.

Appellants nevertheless argue that the doctrine of unclean hands may be used to preclude the pursuit of an action by a particular party. They place great reliance upon the case of *Blain v. Doctor's Co.* (1990) 222 Cal.App.3d 1048, in which Dr. Blain's claim for legal malpractice was precluded on the grounds that his own wrongdoing was responsible for his injury. While Dr. Blain was a doctor-defendant in an earlier medical malpractice

action, he followed the advice of his lawyer to lie at a deposition. Later, he sued his lawyer for legal malpractice. The court ruled that the lawyer-defendant could justifiably claim the doctor-plaintiff had unclean hands preventing any entitlement to such legal malpractice damages, because the doctor's injury was caused by the doctor's own misconduct (lying) and thus the doctor could not state a cause of action arising independently of his own misconduct. (*Id.* at pp. 1064-1065.) The court stated, "whether there is a bar depends upon the analogous case law, the nature of the misconduct, and the relationship of the misconduct to the claimed injuries." (*Id.* at p. 1060.)

On the other hand, Respondent claims this assignment was a purely contractual matter and generally, the unclean hands defense is an equitable matter that should not apply to this case at all. (See *General Electric Co. v. Superior Court* (1955) 45 Cal.2d 897, 899-900; *DeGarmo v. Goldman* (1942) 19 Cal.2d 755, 764-765 [one who violates his contract cannot have recourse to equity to support that violation].) However, later case law recognizes that in some matters, a defense of unclean hands may be asserted in either an equitable context or an action on legal claims, such as breach of contract. For example, in a complicated factual context involving a collective bargaining agreement and its enforceability, and claims for damages under it against the union, the court in *Fibreboard Paper Products Corp. v. East Bay Union of Machinists* (1964) 227 Cal.App.2d 675, 728 (*Fibreboard Paper*) set out these rules: "[T]he equitable defense of unclean hands is available in this state as a defense to a legal action. . . . [A] defendant may set up as many defenses as he may have, regardless of the question as to whether they are of a legal or equitable nature, because the distinction which exists under the

common law between actions at law and suits in equity, and the forms thereof, have been abolished."

In *Fibreboard Paper*, this discussion continues, "It is equally well settled in this state, however, that it is not every wrongful act nor even every fraud which prevents a suitor in equity from obtaining relief. The misconduct which brings the clean hands doctrine into operation must relate directly to the transaction concerning which the complaint is made, i.e., it must pertain to the very subject matter involved and affect the equitable relations between the litigants. Accordingly, relief is not denied because the plaintiff may have acted improperly in the past or because such prior misconduct may indirectly affect the problem before the court." (*Fibreboard Paper, supra,* 227 Cal.App.2d at pp. 728-729; also see *Kendall-Jackson Winery, Ltd. v. Superior Court* (1999) 76 Cal.App.4th. 970, 978-979, 985 ["any evidence of a plaintiff's unclean hands in relation to the transaction before the court or which affects the equitable relations between the litigants in the matter before the court should be available to enable the court to effect a fair result in the litigation"], as quoted in *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 681.)

Such authorities support our conclusion that the trial court was justified in treating the assignment of the claim as a separate contractual matter from the underlying contractual lease relationship. To the extent that Appellants sought a continuance for further discovery to pursue a purported defense of "wrongful assignment," they did not explain how any discovery would support their vague contentions that it was somehow unfair for Dr. Smith to obtain an assignment of the HPSC lease rights and claims, even at

a discounted price. " 'When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived.' " (*Nelson v. Avondale Homeowners Assn.* (2009) 172 Cal.App.4th 857, 862.) "We are not bound to develop appellants' argument for them. [Citation.] The absence of cogent legal argument or citation to authority allows this court to treat the contention as waived." (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 830; *Baines v. Moores, supra,* 172 Cal.App.4th 445, 455.)

" '[A]n appellate court may allow an appellant to assert a new theory of the case on appeal where the facts were clearly put at issue at trial and are undisputed on appeal. [Citation.] However, "if the new theory contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at trial the opposing party should not be required to defend against it on appeal." ' " (*Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1449, citing *Richmond v. Dart Industries, Inc.* (1987) 196 Cal.App.3d 869, 879.)

To obtain an entitlement to a continuance for discovery, Appellants would have had to provide a fuller explanation of how the requested continuance would have resulted in any profitable examination of the proposed unclean hands defense, to somehow prove there was an important relationship between the decade-old contractual claims asserted on behalf of Respondent against Appellants, and Dr. Tiffany's 2010 judgment against Dr. Smith for disability discrimination. No enforcement of judgment issues were before the trial court or this court, such as any "set-offs" that might eventually become appropriate.

At the time of ruling on the summary judgment motion, the trial court was justified in denying the continuance request.

B. Assignability of Chose in Action: Issues About Real Party in Interest

We next examine the validity of the underlying assignment, to the extent that the summary judgment issues depended on it. The claim on the lease obligation qualified as "a right to recover money or other personal property by a judicial proceeding," or a chose or thing in action. (Civ. Code, § 953.) A cause of action for breach of contract is an assignable right. (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 720, p. 805.)

Under section 367, "[e]very action must be prosecuted in the name of the real party in interest." However, it is clear that an assignee of an assignable chose in action has taken legal title and "may sue in his or her own name." (4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 127, pp. 195-196 [explaining equitable doctrine underlies the real party in interest statute, so that the person having the right should be entitled to the remedy]; *id.* at § 120, p. 186.)

Under section 368 and Civil Code section 1459, an assignment "merely transfers the interest of the assignor. The assignee 'stands in the shoes' of the assignor, taking his or her rights and remedies, subject to any defenses that the obligor has against the assignor prior to notice of the assignment." (See 1 Witkin, *supra*, Summary of Cal. Law, § 735, p. 819.)

Further, section 368.5 provides that if a party in a pending action on an assignable cause of action transfers its interest, the action " 'may be continued in the name of the

original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding.' " (4 Witkin, Cal. Procedure, *supra*, § 262, p. 337.)

Although Appellants claimed in their opposing papers that Dr. Smith was the actual real party in interest, and he had to become a named plaintiff, the trial court correctly rejected this argument. Respondent was authorized to make an assignment for the purpose of pursuing its rights, as outlined above, and Appellants did not show it was defective as a matter of law. Although Respondent claims this issue was not fully litigated below, the trial court was made aware of Appellants' objections and properly disposed of them.

Further, California Uniform Commercial Code section 3203, subdivision (b) provides in pertinent part that an instrument transfer (here, an assigned lease) vests in the transferee any right of the transferor to enforce the instrument, unless the transferee engaged in fraud affecting the instrument. Appellants have provided no support for any such finding of fraud that affected the enforceability of the lease obligations, or as discussed above, that required further investigation of the transfer. They have failed to support any claims of error or abuse of discretion in the trial court's denial of the continuance request.

II

ADEQUACY OF RESPONDENT'S SHOWING ON SUMMARY JUDGMENT: SUBSTANTIVE MATTERS

A. Underlying Debt; Secondary Evidence

Appellants the summary judgment should not have been granted because no original copy of the lease was provided to the court. The same copy of the lease was included as an exhibit to the complaint and to Respondent's attorney's declaration. In Appellants' declarations, they claim (without evidentiary support) that the copy of the lease attached to the complaint was not the same document that they signed, since they remember that Dr. Hogan had also signed it. They also argued that Mrs. Tiffany's signature was only intended to be that of a witness, not a party to the lease, but do not explain how or whether that was communicated to Respondent.

"An instrument that cannot be found after a diligent search is lost within the meaning of the foregoing [secondary evidence] rule though it may in fact be in existence. As a rule, the law does not require that the loss or destruction of the original be proved beyond all possibility of mistake." (31 Cal.Jur.3d (2010) Evidence, § 355, p. 525, fns. omitted.) Thus, secondary evidence is generally admissible to prove the content of a writing, and "[t]he nature of the evidence offered affects its weight, not its admissibility. The normal motivation of parties to support their cases with convincing evidence is a deterrent to introduction of unreliable secondary evidence." (Cal. Law Revision Com. com., 29B Pt. 4, West's Ann. Evid. Code (2013 supp.) foll. § 1521, p. 199.) Further: "Subdivision (c) [of Evid. Code § 1521] makes clear that like other evidence, secondary

evidence is admissible only if it is properly authenticated. Under [Evid. Code] Section 1401, the proponent must not only authenticate the original writing, but must also establish that the proffered evidence is secondary evidence of the original." (Cal. Law Revision Com. com., 29B Pt. 4, West's Ann. Evid. Code, *supra,* foll. § 1521, p. 199.)

Appellants have failed to show that under Evidence Code section 1521, subdivision (a), the secondary evidence of the content of the lease should have been excluded, based on any showing of these requirements: "(1) A genuine dispute exists concerning material terms of the writing and justice requires the exclusion. [¶] (2) Admission of the secondary evidence would be unfair." (Evid. Code, § 1521, subd. (a).) First, they provided no expert document examination evidence to support their vague claims. They also do not explain the effect of the 2002 renegotiation of the lease.

Next, Respondent provided the declaration of Brenner, its managing agent, stating he was "completely familiar" with the facts about the default in the lease obligations, and he supplying the dollar amounts due from Appellants. Although Appellants claim that Brenner was only a collection agent, they did not show that he lacked authority on behalf of Respondent to examine its records and assist in pursuing its claims. Appellants also claim that the "person most knowledgeable" who was deposed on behalf of Respondent, Robert Gannon, admitted to not knowing very much about this transaction. However, Appellants' evidentiary objections to the validity of the lease copy were overruled, and no abuse of discretion is shown. The grant of summary judgment was not shown to be erroneous on the grounds they asserted about the lack of an original lease.

B. Judicial Admissions; Evidentiary Rulings

Based on statements made by Appellants in filings in their own bankruptcy proceedings and in those of Dr. Hogan, and in the separate Nevada action they brought against Dr. Hogan, Respondent argues their judicial admissions of liability under the lease sufficed to establish all essential facts regarding the existence of the lease and the amount of the obligations created under it. Respondents sought judicial notice of those filed documents, which was granted.

"A judicial admission in a pleading (either by affirmative allegation or by failure to deny an allegation) is entirely different from an evidentiary admission. The judicial admission is not merely evidence of a fact; it is a conclusive concession of the truth of a matter and has the effect of removing it from the issues. Nor is a judicial admission treated procedurally as evidence; the particular pleading or allegation is not formally offered in evidence but may nevertheless be relied upon and treated in argument as part of the case." (1 Witkin, Cal. Evidence (5th ed. 2012) Hearsay, § 98, p. 922.) For example, "[a] pleading in a prior civil proceeding may be offered as an evidentiary admission against the pleader in a subsequent proceeding." (*Id.*, § 99 at p. 923.)

Respondent alternatively argues for application of the doctrine of judicial estoppel, the elements of which have been summarized as follows: "(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake."

(*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 183 [applying federal doctrine to California law].)

Under either theory, Respondent provided to the court the authenticated 2000 lease copy and the acknowledgment of receipt document as persuasive, probative evidence of admitted liability of Appellants (arguably Mrs. Tiffany also), as parties to the lease who previously had the right to possession of the medical equipment. Dr. Tiffany admitted in pleadings in his own bankruptcy proceedings, and in Dr. Hogan's, and in his Nevada lawsuit, that he was entitled to possession of the leased equipment. He made payments in his bankruptcy proceedings toward the lease obligation. In their separate statement, Appellants acknowledge that the bankruptcy records showed that Respondent had asserted and been allowed a claim of $191,978.80 in their own bankruptcy, and they paid $15,637 toward it (before their bankruptcy was dismissed for their failure to meet the payment schedule). They accordingly identified the disputed amount as the difference, $176,341.80.

"When a court is asked to take judicial notice of a document, the propriety of the court's action depends upon the nature of the facts of which the court takes notice from the document." (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 265 (*Fontenot*).) Here, the court took judicial notice of official documents, not to establish the truth of statements of fact recited within that document, but to establish the legal effect of the documents' language, which is proper when that legal effect is clear and not reasonably subject to dispute. (*Ibid.*; *Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1117-1118 (*Poseidon*).) These included the

bankruptcy case filings showing that Respondent's lease claim was judicially accepted in the amount of $191,978.80, and Appellants made payments upon it, until their case was dismissed. Similarly, the Nevada case filings against Dr. Hogan showed that Appellants claimed they lent the equipment to him and they sought to recover it.

Appellants' judicial admissions were legally operative concessions about their liability under the lease, and no genuine dispute regarding the documents' authenticity was shown to exist. (See *Poseidon, supra*, 152 Cal.App.4th at pp. 1117-1118; *Fontenot, supra,* 198 Cal.App.4th at p. 265 ["From this, the court may deduce and rely upon the legal effect of the recorded document, when that effect is clear from its face."].) There were no issues adequately raised about any misconduct relating directly to the lease transaction, to "affect the equitable relations between the litigants." (*Fibreboard Paper, supra,* 227 Cal.App.2d at pp. 728-729.) As the moving party, Respondent showed no material issues of fact required the process of a trial, and Appellants failed to carry their burden to show that such triable issues remained. (§ 437c, subd. (p)(1); *Aguilar, supra*, 25 Cal.4th 826, 853.)

C. Duplication of Theories of Recovery

Respondent's causes of action included breach of lease agreement, conversion, and claim and delivery. For the latter claim, Civil Code section 3379 allows a person entitled to the immediate possession of specific personal property to recover the same in the manner provided by the Code of Civil Procedure. Similarly, Civil Code section 3380 states, "Any person having the possession or control of a particular article of personal

property, of which he is not the owner, may be compelled specifically to deliver it to the person entitled to its immediate possession."

In light of those alternative causes of action, Appellants argue that Respondent failed to mitigate its contract damages, at some unspecified time, by refusing to accept tender of the leased equipment. Appellants did not cite to any portion of the lease or the security agreement that required acceptance at any particular time of the collateral, in lieu of a contract claim. The record supports the representation by Respondent in its brief that the relief requested on these alternative claims "mirrors the damages claimed on the breach of contract claim and offers no additional recovery to [Respondent]," and the judgment amount comports with that concession.

D. Interest

In its complaint and moving papers, Respondent originally sought an award of interest under the lease as part of the judgment. In its opposition, Appellants argued that the rate to be charged was usurious in nature, and asserted that the remaining proper damages amount would be $176,341.80.

At the hearing on the motion, Respondent dropped its claim for interest to accord with the figures offered by Appellants, and the judgment reflects a reduced amount of damages from that originally requested in the complaint or the motion. There is no need to address Appellants' current claim that the interest rate was usurious.

III

REMAINING FEES AND SANCTIONS ISSUES

A. Attorney Fees and Costs

Respondent seeks remand for further proceedings on the amount of contractual reasonable attorney fees and costs to be awarded, both for trial and on appeal. With respect to the judgment against appellant Dr. Tiffany or his estate, those are matters to be raised before the trial court and we express no opinion on any entitlement to fees.

Regarding the dismissal of Mrs. Tiffany as a party, her claim on appeal is that she is now a prevailing party who is entitled to a reversal of the trial court's order that each party should bear its own attorney fees and costs in this action. Section 1032, subdivision (b) states: "Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." Section 1032, subdivision (a)(4) defines "prevailing party" as including "*a defendant in whose favor a dismissal is entered,* a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant. When any party recovers other than monetary relief *and in situations other than as specified,* the 'prevailing party' shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not . . . ." (Italics added.)

Here, the circumstances of the dismissal, resulting from an oral motion by counsel for Respondent after argument on the summary judgment issues, support a conclusion that Mrs. Tiffany was not entitled to an award of fees as of right. Under section 1032,

subdivision (a)(4), the trial court was allowed some discretion to determine the prevailing party, and to allow or not allow costs, in situations not falling clearly within its statutory categories. (*Lincoln v. Schurgin* (1995) 39 Cal.App.4th 100, 105-106.) Before the hearing, Mrs. Tiffany consistently claimed she was not a party to the lease agreement, but only a witness, but the matter was not entirely clear from the documents and required extensive motion proceedings to resolve the issues. Appellants were allied in interest during the proceedings below, and the trial court heard their combined objections to any recovery by Respondent, and Mrs. Tiffany's dismissal did not occur until counsel for Respondent made an oral motion at the hearing. He sought a waiver of costs and fees and to have the court enter judgment only against Dr. Tiffany, "as a practical matter, if it makes it easier for everyone." In response, Appellants' counsel suggested that she should be unilaterally dismissed, but Respondent continued to request a waiver of costs and fees. The court then made a finding that the summary judgment included a dismissal of Mrs. Tiffany, with both sides to absorb their own attorney fees and costs as to her.

Admittedly, it is not entirely clear from the record whether this amounted to an accepted settlement for the dismissal of Mrs. Tiffany in return for a waiver of fees and costs, or one that was unilaterally imposed by the trial court. In any case, once the court decided that Mrs. Tiffany was entitled to be dismissed, both as a matter of law and at the request of Respondent, and further, that she and Respondent should each bear their own costs, Appellants' attorney said, "Thank you." This does not seem to be a sufficient challenge to preserve this costs objection as an issue on appeal. "A trial court abuses its discretion in making an award of costs only if its decision exceeds the bounds of reason.

Whether we would have made the same determination in the first instance is immaterial. As long as the contested decision is supported by reasonable inferences, we have no authority to substitute our judgment for that of the trial court." (*Lincoln v. Schurgin, supra,* 39 Cal.App.4th 100, 105-106.)

Under all the circumstances, the trial court was reasonably attempting to put an end to the case by interpreting a somewhat confusing record, as it was being developed on the spot, and we cannot designate its order on these fees and costs to be an abuse of discretion. In addressing the dismissal request, the court acknowledged that Mrs. Tiffany's prevailing party status was not yet clear and it then clarified the matter, to avoid any further proceedings in this respect. This was not an abuse of discretion.

B. Sanctions

Finally, claiming that this appeal was meritless, Respondent seeks an award of sanctions against Appellants and their counsel, plus fees and costs, "in an amount sufficient to punish and deter this misconduct."

When an award of sanctions on appeal is sought, the courts will consider whether the appeal was objectively or subjectively frivolous. (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650; *Millennium Corporate Solutions v. Peckinpaugh* (2005) 126 Cal.App.4th 352, 360.) An appeal may be deemed subjectively frivolous in nature if it was brought for an improper purpose, such as harassment or delay in enforcement of the judgment. (*Ibid*.) The subjective and objective standards may be considered together, in evaluating any substantive lack of merit of the legal positions taken by the appellant. (*Ibid.* at fn. 5.)

Here, the issues presented are complex enough in nature to have required some degree of diligent analysis for resolution. Appellants presented at least colorable, although unsuccessful, claims for relief. None of the briefs, including Respondent's, is a model of clarity. For these reasons, we deny Respondent's request for sanctions.

DISPOSITION

Judgment is affirmed. Each party is to bear its own costs on appeal.

HUFFMAN, J.

WE CONCUR:

BENKE, Acting P. J.

McDONALD, J.